Spring 2012

Alyssa Saenz, Best of Section C, Best Overall

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No. 10-9109

IN THE

SUPREME COURT OF THE UNITED STATES

Michael Fernando,

Petitioner,

v.

Murano United School District,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE FIFTIETH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. Whether student speech outside the school setting is governed by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and its progeny?

II. If so, whether application of *Tinker* standard and its progeny allow Petitioner's speech to be regulated by Respondent, the Murano School District?

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The opinion of the United States District Court for the Southern District of Lovely State is unreported but may be found on pages 15-17 of the appellate record. (R. at 15-17). The opinion of the United States Court of Appeals for the 50th Circuit Court is likewise unreported but may be found at page 20 of the appellate record (R. at 20).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on September 30, 2010. (R. at 20). Petitioner filed his petition for writ of certiorari on December 30, 2010. (R. at 21). This Court granted the petition on June 7, 2011. (R. at 22). This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2006).

STANDARD OF REVIEW

A district court's fact findings and the reasonable inferences to be drawn from them are reviewed for clear error. Its legal conclusions are reviewed *de novo.*

CONSTITUTIONAL PROVISION

The First Amendment of the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

On September 9, 2009, Michael Fernando ("Fernando") created a virtual group page on an independent social networking site called "Facebook." (R. at 15). The group was formed to protest recent hiring decisions of the Murano School District ("Murano") where Fernando is currently a student. (R. at 2). In addition, Fernando hoped that the page would serve to inform the community while providing a forum where other students would be able to assemble in order to voice their related opinions. (R. at 2 & 6).

Fernando never advertised, displayed or accessed the page on school grounds or during school hours. (R. at 6). Nevertheless, the group continually gained popularity as students became increasingly invested in the site's content. (R. at 6). Group subscribers, acting independent of Fernando, began directing the page's content by posting their own expressions in various forms. (R. at 6).

The group came to the attention of school administrators when, without his knowledge or consent, Fernando's drawings surfaced on campus. (R. at 15). Although he drew and posted content for the page, it was not his intention for said content to be brought or otherwise seen on school grounds. (R. at 6).

On September 14, 2009, in violation of the First Amendment, administrators demanded that Fernando delete the group. (R. at 7). In recognition of his constitutional rights, Fernando refused. (R. at 7). His refusal resulted in his indefinite suspension from Murano I High School. (R. at 12). Because of this punishment, Fernando, an Advanced Placement student who maintained a 4.0 grade point average and also served as the varsity basketball captain, will be forced to miss indefinite educational and extracurricular opportunities. (R. at 6 & 17).

In order to ameliorate potentially irrevocable damages to Fernando, Fernando's attorney filed a motion for preliminary injunction to enjoin Murano from continuing his suspension from school. (R. at 6). The District Court for the Southern District of Lovelystate denied the motion. (R. at 15-17). Unwilling to recognize a distinction between on and off-campus speech, the Court hypothesized that the site's effects would be found to outweigh Fernando's harms and he is, therefore, unlikely to succeed based on the merits of the case. (R. at 17). The United States Court of Appeals for the Fiftieth Circuit subsequently affirmed the district court's decision without further analysis. (R. at 19).

On June 7, 2011, Fernando's Petition for Writ of Certiorari to this Court was granted. (R. at 22). Fernando respectfully requests that this Court reverse the decision of the Fiftieth Circuit Court of Appeals. Insomuch as the First Amendment to the Constitution protects freedom of speech of American citizens, Michael Fernando and other students should be protected from unjustifiable punishments for off campus expressions. (R. at 10).

SUMMARY OF ARGUMENT

I.

Michael Fernando's First Amendment rights were violated when the Murano United School District unreasonably demanded that he remove content from the internet that was not created at school. The four Supreme Court cases that have thus far addressed students' First Amendment rights show that school jurisdiction over student expressions should be limited; to rule otherwise would infringe upon their constitutional rights. Although the Court has eroded the broad protections originally allowed by *Tinker*, they exclusively define school speech as speech

occurring in school-sponsored, school-supervised settings. Speech that occurs outside of these bounds is not subject to the restrictive precedent of school speech cases and is instead protected by the First Amendment.

II.

Even if *Tinker* and its progeny are held to apply to off campus speech, the District Court erred in its application of the "substantial disruption" standard set by *Tinker*. Though the District Court did not apply any specific test to determine if a substantial disruption occurred, the effects of Fernando's expressions did not meet either the sufficient nexus test or the foreseeability test that have been employed by other courts to determine the school's right to jurisdiction. Additionally, because Fernando's speech occurred online, in a voluntary public forum, it cannot reasonably be held to meet the standards set by *Fraser* and *Hazelwood*. There is no evidence that the operation or safety of the school was put in jeopardy by Fernando, making the district's attempted restriction and subsequent punishment unconstitutional.

ARGUMENT

I. STUDENT SPEECH OCCURRING OUTSIDE THE SCHOOL SETTING SHOULD BE PROTECTED BY THE FIRST AMENDMENT AND NOT SUBJECT TO THE RESTRICTIVE STANDARDS IMPOSED BY *TINKER* AND ITS PROGENY.

The First Amendment to the Constitution prohibits the government from creating any law that would abridge the people's freedom of speech. U.S. Const. amend. I. The Supreme Court empirically holds the First Amendment in high esteem, recognizing it as the fundamental source of American strength, independence and vigor. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969). Additionally, this Court has recognized the importance of upholding the comprehensive authority of the States and school officials to control conduct in schools so

long as their exercise of control is "consistent with fundamental constitutional safeguards." *See id.* at 507.

The juxtaposition of these competing values has resulted in contradictory theories concerning whether the First Amendment protects student speech. Some believe that "scrupulous protection" of our Constitutional freedoms is necessary in public schools, lest we "strangle the free mind at its source." *See id.* at 507. Conversely, it has been said that the First Amendment protections afforded to adults were not intended to apply to students within a public school. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 676 (1986).

In either case, expressions that take place outside of the bounds of school-regulated activities should be afforded the full protection of the First Amendment. (R. at 16) (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). Those subscribing to the "scrupulous protection" standard of protection would not logically bestow fewer rights to expressions that take place outside of school. *See Tinker*, 393 U.S. at 507. On the other end of the spectrum, those who believe that students should not be protected under the First Amendment while in school cannot exhaustively deny the constitutional rights of children by extending the authority of school administrators interminably. *See id.* at 511. The Supreme Court made it clear that students have fundamental rights that the State is required to respect and therefore concluded that schools do not have absolute authority to repress students' speech. *See id.* While there may be some confusion at the outer boundaries as to when courts should apply *Tinker* and other precedents, it is undeniable that an outer boundary exists, thereby limiting a school's ability to exercise dominion over its' students. *See Morse v. Frederick*, 551 U.S. 393, 401 (2007) (citing *Porter v. Ascension Parish Sch. Bd.,* 393 F.3d 608, 615 n.22 (5th Cir. 2004)).

Because non-school speech is entitled to the more robust protections of the First Amendment, it is vital for courts to distinguish between on and off campus student speech. *Morse* at 404-05. Supreme Court precedent gives us a definition of "school speech" that has evolved past *Tinker*'s original geography standard to include actions that occur in either a primary or secondary school setting. *See, e.g.*, *id.*

A. *Tinker* safeguards the First Amendment rights of students by expressly and impliedly recognizing the limited nature of schools' regulatory authority.

Tinker, which remains the seminal Supreme Court case addressing school speech despite subsequent exceptions, established broad protections of students' First Amendment rights. *See Tinker*. In *Tinker*, the Court overruled a school's refusal to permit students to wear black armbands in protest of the conflagration in Vietnam. *See id.* at 508, 514. The *Tinker* court, wary to abate the express freedoms of the Constitution, cautiously concluded that the First Amendment permitted reasonable regulation of speech in "carefully restricted circumstances." *See id.* at 513. Because of the school's educational and inculcative role, this Court held that a school may regulate students' on-campus speech if it "materially and substantially" disrupts school activities, if the school can reasonably forecast that it will do so, or if the speech encroaches on the rights of another. *See id.* at 514. The Court further emphasized that mere "fear or apprehension of disturbance" is not enough to supersede the right to freedom of expression. *See id.* at 508. Unless there is a constitutionally valid reason for administrators to regulate an expression, students are entitled to express themselves freely. *See id.* at 511.

The *Tinker* court began its analysis by recognizing the Constitutional rights of children when they famously stated that students do not forgo their rights upon entering the schoolhouse gate. *See id* at 506. Here, the Court implicitly declared that the constitutional rights of children not only pre-exist their status as students but also supersedes it. *See id.* Although it would render

this imagery illogical, some confusion remains as to what extent *Tinker* was meant to apply to speech created beyond the actual or proverbial "schoolhouse gate." *See, e.g.*, *id*. at 401.

This confusion most likely stems from the passage in *Tinker* that expresses that any behavior by a student, "in class or out of it", which for any reason materially disrupts classwork or invades the rights of others is not protected by freedom of speech, regardless of the "time, place or type of behavior." *See id.* at 513. Read in context, this passage can only be meant to apply to locations, like the cafeteria, that are on school grounds but are outside of the traditional classroom. *See id.* at 512-13. Otherwise, the carefully chosen examples written by the court would be completely arbitrary. *See id*. Moreover, the court emphasizes the school's "special characteristics" as a justification for empowering administrators to regulate student speech. *See id.* at 506. Application of the *Tinker* standard beyond school-sponsored activities would violate the very justification upon which *Tinker* was based. *See Tinker.* If *Tinker* had been meant to apply to speech occurring off school grounds, subsequent exceptions would not have been necessary.

B. Although subsequent Supreme Court holdings may apply beyond the physical limits of the schoolhouse gate, they only do so under limited circumstances during school-related activities.

The broad protections sanctioned by *Tinker* were gradually eroded by the narrow exceptions created by the three subsequent Supreme Court decisions. *See Fraser*, 478 U.S. at 683; *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Morse*, 551 U.S. at 397. Taken as a whole, these cases largely circumvent the geographic limitations of *Tinker*'s "schoolhouse gate" metaphor and allow administrators to govern speech in other limited circumstances, therefore expanding the definition of what qualifies as "school speech." *See Fraser; Hazelwood; & Morse.*

In *Fraser*, a student was disciplined for including sexually inappropriate, lewd language during a school speech endorsing a candidate for student government. *See Fraser*, 478 U.S. at 677-78. Although it distinguished *Tinker*'s "substantial disruption" test by not requiring that a substantial disruption actually occur, the *Fraser* decision applies in one extremely narrow circumstance—a school-sponsored assembly. *See id.* at 676, 681. The Court rationalizes their holding by stating that a classroom or assembly is not a place for sexually explicit expressions directed towards a captive audience of teenage students; it never references situations occurring off campus. *See id.* at 685. The holding repeatedly references the protective obligations of the school and uses those obligations to justify their analysis. *See id.*

Moreover, Justice Blackmun clarified that if Fraser had given a comparable speech "outside of the school environment", he could not have been punished simply because government officials considered his language indecent or offensive. *See id*. at 688 (Blackmun, J., concurring). This further proves that a line, whether geographical or otherwise, exists which separates speech protected by the First Amendment and speech that is subject to the restrictions of school speech cases. *See id.* As the Third Circuit warned, applying Fraser to off-campus speech would be a slippery slope, ultimately making punishable any potentially offensive student expressions about the school. *See J.S. ex rel. Snyder v. Blue Mtn. Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011).

In *Hazelwood*, the Court reached beyond the traditionally geographic boundaries encompassing school jurisdiction when it held that schools are able to regulate school-sponsored publications so long as their supervision is consistent with legitimate educational concerns. *See Hazelwood Sch. Dist.*, 484 U.S. at 272-73. In this case, the school principal deemed two student-written articles inappropriate and subsequently pulled them from the school newspaper. *See id.* at

263. The Supreme Court supported the principal's authority to do so and held that regulating school-sponsored speech that may be reasonably be seen as bearing the imprimatur of the school was not a violation of the First Amendment so long as the regulations are "related to legitimate pedagogical concerns." *See id.* at 273. Though the Supreme Court further eroded *Tinker* by allowing reasonable editorial discretion to school administrators over school-sponsored activities, it did not expressly extend that right to any off-campus speech which has not been affirmatively promoted by the school or would otherwise reasonably be received as bearing the imprimatur of the school. *See id.* at 270-271.

Morse v. Frederick is the most recent case concerning student speech. Morse involves a student displaying a banner that read "BONG HiTS 4 JESUS" at a school-sponsored event. *See Morse* at 397. The principal confiscated the banner and suspended the student after having asked him to take it down. *See id.* Because the event occurred during normal school hours, was sanctioned by the principal, and was supervised by faculty, the *Morse* court held that this is a school speech case. *See id.* at 400-401. The Court found that the banner can reasonably be seen as promoting drug use and, because of the school's obligation to protect students from this type of content, should not be protected by the First Amendment when displayed at a school-sponsored event. *See id.* at 403-409. Like its predecessor, this holding applies to speech outside of the physical boundaries of the school grounds but during an activity that inherently possesses the special characteristics first recognized in *Tinker*. *See id.*

One link between each of the aforementioned cases is that the school punished speech that occurred either at school or at a school-sponsored event. Since there is no enumerated test to determine what qualifies as school speech, these cases give us the only guidelines as to what types of speech the Supreme Court considers governable by officials. The two most recent cases

somewhat blurred the geographical bright-line between on and off-campus speech. Still, we are left with a fairly simple test of whether a particular expression is governed by these two exceptions: does the expression employ a medium sponsored by the school or did it take place at a school-sponsored event? In essence, when out-of-school speech falls outside of the realm of those two exceptions, it cannot be punishable by school officials.

II. ALTERNATIVELY, SHOULD THE RULINGS OF *TINKER* AND ITS PROGENY BE FOUND TO APPLY TO SPEECH OCCURRING OUTSIDE OF THE SCHOOL SETTING, SCHOOL SPEECH JURISPRUDENCE DOES NOT SUPPORT MURANO'S REGULATION IN THE INSTANT CASE.

Regardless of whether this Court orders that *Tinker* and its progeny governs out-of-school speech, the district's punishment of Michael Fernando is unjustifiable according to school speech jurisprudence. Fernando's website, protesting hiring practices at the school, is the exact kind of speech that is meant to be protected by the First Amendment. *See Schaumburg v. Citizens for Better Env't,* 444 U.S. 620, 632 (1980) ("communication of information, the dissemination and propagation of ideas, and the advocacy of causes... are within the protection of the First Amendment"). Changes in technology should not obscure our constitutional lines and should therefore not change the view of what student speech is and is not. (R. at 17) (citing *Citizens United v. Fed. Election Comm'n,* 130 S. Ct. 876, 891 (2010)). In his recent concurrence in *J.S. ex rel. Snyder v. Blue Mountain School District*, Judge Smith stated that the decision as to whether speech is on-campus or off clearly cannot be based on where the speaker sits. *See Snyder*, 650 F.3d at 940 (Smith, J., concurring). The point is well taken because of the omnipresent reach of Internet speech. However, a student's expressive act on Facebook can be analyzed using existing school speech jurisprudence.

A. Fernando's website cannot be determined to cause a "substantial disruption" because it does not meet the standards of the sufficient nexus test or the foreseeability approach.

Unlike the Supreme Court's school speech cases, the instant case concerns an expression which occurred off-campus in a forum that was not sponsored by the school. *See Fraser*, 478 U.S. at 683; *Hazelwood Sch. Dist.,* 484 U.S. at 273; *Morse*, 551 U.S. at 397. Because the Supreme Court has not directly ruled on cases concerning online student speech, each jurisdiction has developed their own interpretations of student speech precedents, causing starkly contrasting holdings in factually parallel cases. *Compare Snyder, 650 F.3d & Layshock ex rel. Layshock,* 650 F.3d 205 (3d Cir. 2011). Where courts have been consistent, is in requiring that a link be drawn that validates the school's punishment of speech, like Fernando's, which takes place outside of school. *See e.g.*, *Thomas v. Bd. of Educ.* (refusing to use school speech precedent because the connection between the speech and the school was considered *de minimus*).

The Second Circuit, for example, considered whether the off-campus speech was aimed at the school, and would foreseeably come on campus. *See Doninger v. Niehoff*, 642 F.3d 334, 341 (2d Cir. 2011); *Wisniewski ex rel. Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.,* 494 F.3d 34, 38-39 (2d Cir. 2007). Doninger's blog explicitly encouraged students and others to contact the school administration to protest the cancellation of a school activity, thus it was "aimed at" the school. *See Doninger*, 642 F.3d at 341. In *Wisniewski*, the Second Circuit expressly held that off-campus speech could be the basis of school discipline when a student's violent and threatening off-campus instant message about killing a teacher "posed a reasonably foreseeable risk" that it would materially and substantially disrupt the school. *See Wisniewski*, 494 F.3d at 341.

Both of these cases differ from the instant case. Unlike Doninger and Wisniewski, Fernando's speech was not intended as a threat nor was it intended to cause any immediate action that would affect the business operations of the school. (R. at 6). In *Wisniewski*, the expression in question was threatening in nature. *See id.* at 38-39. This language is not meant to be protected by the First Amendment. *See Porter v. Ascension Parish Sch Bd.,* 393 F.3d 608 (5th Cir. 2004) (5th—2004) (citing *Virginia v. Black*, 538 U.S. 343, 359 (2003)). The Fourth Circuit provides a parallel example when they allowed a school to punish speech that inherently violated a specific student with defamatory content. *See Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565 (4th Cir. 2011). These types of expression could have been proscribed by any government entity. *See Thomas,* 607 F.2d at 1045. These jurisdictions extended the arm of the school in a case where the speech was not protected to begin with. In no way can the expressions created by Fernando be deemed violent or threatening, and should therefore be entitled to the full protections of the First Amendment. (R. at 6).

Alternatively, lower courts have applied the sufficient nexus approach, which works concurrently with Tinker's substantial disruption test. Here, the initial step is to determine whether there is a sufficient nexus between the expression and disruption on campus. *See Layshock,* 496 F. Supp. 2d. If a nexus does not exist, there is no justification for punishment and the inquiry ends. If there is a sufficient nexus, the substantial disruption test is triggered.

The *Layshock* holding correctly applied the substantial disruption test to off-campus cyberspeech because it used the sufficient nexus test appropriately. *See Layshock v. Hermitage Sch. Dist.,* 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007). Instead of using the test to link the speech to the school, the court in Layshock used the test to determine whether the speech caused a substantial disruption at the school. *See id.* This is an important distinction because if there is no

substantial disruption or reasonable likelihood of disruption, the speech should be protected. *See Tinker*, 393 U.S. at 514. The best way to determine if speech has caused a substantial disruption is to determine whether there is a sufficient nexus between the speech and any disruption caused at school. *See Layshock*, 496 F. Supp. 2d at 599.

If the sufficient-nexus test is properly applied to Fernando's speech, it cannot reasonably be concluded that a nexus exists. According to the record, research has found that it is common for students to access Facebook from school and there is no evidence linking Fernando's group page to this trend. (R. at 2). Regardless, merely accessing a website at school would not create a nexus sufficient to justify the application of school speech standards to an expression created outside of school. *See id*. at 601. Furthermore, the drawing being brought to school does not in itself cause a substantial disruption. *Cf. Killion v. Franklin Reg'l Sch. Dist.,* 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001). Providing an example, the Fifth Circuit in Porter held that a school could not punish a student for a drawing brought on campus without his consent. *See Porter*, 393 F.3d at 615.

Furthermore, it is questionable whether the effects, which the district judge refers to as "not insignificant disruptions", can constitute a substantial disruption. (R. at 16). Students passed the drawings around during classes and continuously referenced the content thereby making it difficult for teachers to maintain discipline in their classrooms. (R. at 12). Justice Black's dissent in *Tinker* described conduct similar to what took place at Murano I. *See Tinker*, 393 U.S. at 518 (Black, J., dissenting). The majority opinion in Tinker also references comments being made but distinguishes these from threats or acts of violence. *See id.* at 508. There, though vague, are the most specific guidelines given by the *Tinker* court to determine what would constitute a substantial disruption. *See id.* The type of exchange illustrated by the instant case was

encouraged by Tinker as a free exchange of ideas and a necessary evil in schools. *Tinker*, 393 U.S. at 512.

B. Absent a substantial disruption, *Fraser* does not permit jurisdiction over offensive online speech, regardless of where it is created or accessed.

Fraser mentions three factors, outside of *Tinker*, that would be necessary for a school to assert jurisdiction over student speech: 1.) Presence of a captive audience; 2.) The speech must include lewd or indecent sexual content; and 3.) The school must have a need to disassociate itself from the speech. *See Fraser*, 478 U.S. at 683. Yet the District Court of Lovelystate only addresses one of these standards when they classify Fernando's speech as lewd. (R. at 16). Had the court applied the other two prongs of this test, they would conclude that Fraser cannot logically apply to online speech.

The Internet has no captive audience. Black's Law Dictionary defines the captive-audience doctrine in constitutional law as a principle that when an observer cannot realistically escape the expression, the speech can be restricted. *Black's Law Dictionary* 240 (9th ed. 2009). The Internet cannot possibly be subject to this principle. The record does not indicate that the website was mandatory or in any other way forced upon its subscribers. Any individual or group that found the site offensive can simply avoid the website and its contents. Generally, content that is viewed online is subject to the will of the viewer. *Tinker* also recognized the captive audience doctrine as justification for holding that a state may proscribe conduct in certain school settings. *See Tinker*, 393 U.S. at 515

The *Frasier* Court analyzed at length the school's interest in disassociating itself from the lewd and sexually explicit language in Fraser's monologue. *See Fraser*, 478 U.S. at 685. The source of their interest was that the school sponsored the assembly where the speech was presented and it was necessary to make a point that such language was "inconsistent with the

fundamental values" of public schools. *See id*. In Hazelwood, this "disassociation" argument is clarified to include the imprimatur of the school and a reasonable likelihood that the expression would be directly associated with the views of the school. *See Hazelwood Sch. Dist*., 484 U.S. at 281. Furthermore, *Hazelwood* concludes that the expression must also be in the context of a curricular activity. *See id*. Facebook, the site on which Fernando created his group, is a global social networking site that is entirely unaffiliated with the Murano school district. (R. at 8). Courts have found independent websites to have an out-of-school nature even if they are directed towards particular students or schools. *See, e.g., Emmett v. Kent Sch. Dis. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000). It would be completely unreasonable, based on information in the record, for a person to conclude that the Facebook group bears the imprimatur of the school district.

Facebook, as a forum for Fernando's protest group, cannot feasibly meet all three prongs of the Fraser test. *See Fraser*, 478 U.S. at 683. Not only is Facebook a global internet site, inherently without a captive audience, but it also would not reasonably be affiliated with the school district to warrant their suppression of the site. The District Court of Lovelystate's holding applied incomplete precedent to vague facts and, because of this, produced an erroneous holding that should be reversed by this Court. (R. at 16).

C. Limiting the reach of *Tinker* and its progeny to speech which occurs on school grounds does not inhibit the ability for schools to maintain a safe environment.

By limiting *Tinker* and its progeny, schools do not lose their ability to protect students. Other tests exist to evaluate free speech, namely the "true threat" test. Expressions where the speaker intends to communicate a serious expression of intent to commit an act of unlawful violence are considered "true threats." *See Porter*, 393 F.3d 608 (5th—2004) (citing *Virginia v. Black*, 538 U.S. 343, 359 (2003)). True threats are not protected by the First Amendment. *See id*.

Therefore, any threatening speech can be addressed by administrators regardless of whether the true threat takes place outside of school or was not communicated directly to the school, thus allowing them to maintain a protective environment for their faculty and study body. *See, e.g.*, *Porter*, 393 F.3d 608 (5th—2004). Similarly, the "fighting words" test can be applied to regulate off-campus speech that is aimed at the school, student body or faculty and would likely result invoke a physically violent response in a reasonable person. (R. at 8) (citing *Klein v. Smith*, 635 F. Supp. 1440, 1442 (1986)). In addition, schools do maintain the option of punishing the perpetrators of any "substantial disruption" on schools grounds even when they cannot punish the incentivizing idea.

CONCLUSION

The Supreme Court has consistently recognized the importance of the First Amendment and the indefinite detrimental consequences that result when citizens are denied this fundamental right. By reconciling the presented facts with existing school speech jurisprudence, it becomes clear that Fernando's rights were violated by the school district. His Internet site should not qualify as school speech under Supreme Court doctrine because it does not occur on school grounds or during any school-supervised, school-sponsored activity. Furthermore, there is no evidence that a substantial disruption took place nor is there evidence linking Fernando's actions to any conduct disturbing the function of the school. Absent a substantial disruption, the punishing student speech can only be justified if the school maintains a protective role of a captive audience or if the speech could reasonably be seen to bear the imprimatur of the school. Neither of these exceptions are met in the instant case, further proving that the district attempted to restrict Fernando's speech for no reason other than to avoid their own discomfort, making their actions unconstitutional and reprehensible.

PRAYER

For these reasons, Petitioner prays the Court overturn the decision of the court below and remand for further proceedings.

Respectfully submitted this 9th day of March, 2012.

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